

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

4 RAMCHANDRA ADHIKARI, . Civil Action  
5 ET AL., . No. H-09-1237  
6 .  
7 VS. .  
8 . September 25, 2012  
9 DAUD & PARTNERS, ET AL. . 1:40 P.M.  
10 . HOUSTON, TEXAS  
11 .

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE KEITH P. ELLISON  
14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 FOR PLAINTIFFS: MS. AGNIESZKA M. FRYSZMAN  
17 MS. MAUREEN E. MCOWEN  
18 Cohen Milstein, et al.  
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22 FOR DEFENDANT  
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Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

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3 FOR DEFENDANT KBR:

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9 OFFICIAL COURT REPORTER: MS. STEPHANIE KAY CARLISLE

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\* \* \*

P R O C E E D I N G S

(September 25, 2012)

THE COURT: Good afternoon and welcome. We will take appearances of counsel beginning with plaintiffs.

01:40:42PM MS. FRYSZMAN: Agnieszka Fryszman for the plaintiff, Your Honor.

MS. MCOWEN: Maureen McOwen for the plaintiffs.

THE COURT: Thank you.

MR. FALLS: Justin Falls for defendant, Daoud & Partners.

THE COURT: Thank you.

MR. DONLEY: I'm Billy Donley for the KBR defendants. With me today, I have Mike Mengis, also with Baker and Hostetler.

MR. HOCHMUTH: Farrell Hochmuth with Baker and Hostetler. And Mr. Dean Graves, in-house with KBR.

THE COURT: Thank you.

All right. We have got quite a lot of paper on all this. And one of the more recent filings where plaintiff indicated they were dropping counts four and five, I gather that would change the terrain quite a lot, wouldn't it?

01:41:21PM MS. FRYSZMAN: We decided to do that to try to vindicate this trial in the country that we have. We have narrow discovery --

01:41:36PM THE COURT: Now --

1 THE COURT REPORTER: I'm sorry. I'm not getting  
2 anything you're saying.

3 THE COURT: Yeah, no. That's just a problem. Why  
4 don't you come to the mike.

01:41:44PM 5 MS. FRYSZMAN: Yes, it would narrow the issues that  
6 we would attempt to seek discovery on in trial so we could  
7 have a case that we could try --

8 THE COURT: Well, wouldn't it affect a lot of these  
9 pending motions in terms of how much electronic discovery you  
01:41:56PM 10 need or how long depositions need to be or --

11 MS. FRYSZMAN: I think so, yes.

12 THE COURT: Have you discussed, between and among  
13 yourselves, how it might effect any of these pending motions?

14 MS. FRYSZMAN: No, I guess we haven't. I mean, we  
01:42:11PM 15 have discussed some of the pending discovery with Farrell, but  
16 I think --

17 MR. DONLEY: May I, Your Honor?

18 THE COURT: Yes, sir.

19 MR. DONLEY: If I may. Your Honor, we have sent  
01:42:19PM 20 correspondence to plaintiffs' counsel -- Billy Donley, for the  
21 KBR defendants. We have sent correspondence to plaintiffs'  
22 counsel asking, now that you have dropped these claims -- and  
23 at the time they were only going to drop them, so they hadn't  
24 been dropped yet -- we asked would you now tell us what  
01:42:33PM 25 discovery requests of us you are withdrawing, and we haven't

1 received a response yet.

2 MR. SARLES: May I, Your Honor?

3 THE COURT: Yes, sir.

4 MR. SARLES: Just to clarify, as I understand it,

01:42:43PM 5 the plaintiffs are not dropping any of their RICO claims as

6 against Daoud & Partners entities. So from our perspective

7 the case remains identically as broad.

8 MS. FRYSZMAN: We haven't been ignoring Mr. Donley's

9 e-mail. We just got it. We're working on it. We flew down

01:43:00PM 10 here and we are working on it.

11 THE COURT: Have you thought how you wish to

12 proceed? You have -- we've got procedural motions, KBR's

13 motion for leave regarding depositions of persons with

14 knowledge, the plaintiffs' motion for a continuance as to the

01:43:32PM 15 summary judgment, then we have six discovery motions.

16 I am sorry we are having this right on the

17 heels of the change in plaintiffs' pleadings, but I guess -- I

18 don't have a better solution than to just go through one by

19 one. So -- just generally, thematically, I do think this is a

01:44:15PM 20 case in which the normal limits on depositions will have to be

21 exceeded both in terms of the number of people to be deposed

22 and, at least with respect to many of the deponents, a longer

23 -- a longer timeframe than seven hours.

24 The issues that are brought up in terms of

01:44:50PM 25 where depositions take place and whether depositions could be

1 taken by video link, I really would have thought you could  
2 have agreed on those without needing my involvement; but I  
3 guess you haven't. Okay. If nobody has a better order of  
4 worship, I will just start with the two procedural motions and  
01:45:17PM 5 we will proceed from there.

6 KBR, defendant's motion for leave regarding  
7 depositions, of course, we acknowledge. Do you want to speak  
8 to that? I mean, I think I understand your papers; I think I  
9 understand what you are saying.

01:45:33PM 10 MR. DONLEY: Yep. Thank you, Your Honor. The  
11 motion is very simple. Two points we made in the motion,  
12 really on two issues we are asking for. One is, Your Honor,  
13 we understand presently that the discovery of deadline just  
14 ran on September 15th.

01:45:47PM 15 THE COURT: That will be extended.

16 MR. DONLEY: Thank you, Your Honor. With that being  
17 extended then, the other point in our motion is, and I think  
18 you may have just resolved it, we are asking for more than ten  
19 depositions.

01:45:58PM 20 THE COURT: You are entitled to that.

21 MR. DONLEY: Okay. Thank Your Honor.

22 THE COURT: Do you know how many more?

23 MR DONLEY: Well, right now, they have -- plaintiffs  
24 have listed 13 persons that they would call as witnesses. We  
01:46:09PM 25 understand it. So we need those plus the plaintiffs'

1 depositions. So that's about another 26, I believe. So  
2 that's 39 in total. In addition to that, Your Honor, they  
3 have 238 persons, or groups, listed with knowledge or relevant  
4 facts. I'm not sure yet how to narrow that down. We are  
01:46:30PM 5 going to have to narrow that down somehow, but my point being  
6 that there may be additional depositions beyond those which I  
7 can currently imagine as a result of that.

8 THE COURT: Do the defendants want to speak to that?

9 MS. FRYSZMAN: Your Honor, we have no objection to  
01:46:53PM 10 exceeding the ten. Our position -- the position that we had  
11 arrived at is that they said that discovery had run. We  
12 hadn't noticed any, so we are entitled to zero and they were  
13 entitled to --

14 THE COURT: No. Hopefully you are to entitled to  
01:47:05PM 15 more.

16 MS. FRYSZMAN: Okay. We were just trying to reach  
17 an equitable result so that we would both be entitled to  
18 more --

19 THE COURT: You are both entitled to more and I  
01:47:13PM 20 think, at least when those witnesses who need translation are  
21 testifying, you are entitled to more than seven hours. I  
22 don't know if it makes sense for me to try to derive a number  
23 as to either right now. I really don't know how many  
24 depositions will be needed. And I don't know the hours that  
01:47:40PM 25 will be needed for each. I mean, y'all haven't done very well

1 about agreeing. I would, in most cases, just say take the  
2 depositions you need; and if you reach loggerheads, come back  
3 to me. I know that hasn't worked very well in this case. But  
4 without knowing more about the people you have designated as  
01:48:05PM 5 persons with knowledge, I don't know how I can pretermi  
6 defendants' --

7 MS. FRYSZMAN: I just --

8 THE COURT: -- rights to talk to them.

9 MS. FRYSZMAN: Speak to that. Defendants asked us  
01:48:12PM 10 an interrogatory for the names of all persons with knowledge  
11 of the kidnapping of the deceased victims and the posting on  
12 the Internet. So...

13 THE COURT: So, okay. I'd have to --

14 MS. FRYSZMAN: So we answered that interrogatory in  
01:48:24PM 15 full with everyone that we believe had knowledge about it. I  
16 think it is actually not relevant to the claims in the case,  
17 but we answered it in full. I don't see a real need for any  
18 of us -- 238 people who need to be deposed, and many of them  
19 are people who work at KBR, in fact.

01:48:41PM 20 THE COURT: How about those -- I mean, in addition  
21 to the plaintiffs, and how about -- and their family  
22 members -- the additional 13 individuals that Mr. Donley  
23 referred to?

24 MS. FRYSZMAN: (No audible response.)

01:48:54PM 25 THE COURT: I understood him to say 13 plus, plus



1 with the plaintiffs --

2 MR. DONLEY: That's correct, Your Honor.

3 MS. FRYSZMAN: And KBR has designated 26 under --  
4 those are our Rule 26 designated so far. KBR has designated  
5 26 people under Rule 26 and an additional 40 something --

6 THE COURT REPORTER: She is talking too fast.

7 THE COURT: Okay, yeah.

8 MS. FRYSZMAN: I'm sorry.

9 KBR has designated 26 people under Rule 26. An  
10 additional 47 have been identified by KBR as persons with  
11 knowledge of incidents in the complaint. So we just want  
12 proportionality. If there --

13 THE COURT: I'm going to give each of you 30 for  
14 now. You can come back and talk to me if you want more. I am  
01:49:32PM 15 hoping that it is the kind of case where, after you have  
16 deposed a few people, you will see a pattern and won't need to  
17 depose everyone. But you are a lot closer to the facts than I  
18 am.

19 MS. FRYSZMAN: Thank you, Your Honor.

01:49:47PM 20 THE COURT: In terms of how much longer, why don't  
21 we use the rule of thumb that, instead of 7 hours when  
22 translation is involved, it will be 10 hours. And it will be  
23 the deponent's choice, deponent and counsel's choice as to  
24 whether that's all on one day or should be spread over  
01:50:20PM 25 two days.

1 MS. FRYSZMAN: Will that 10 hours, Your Honor, apply  
2 to Mr. Gurung? He has been deposed for nine and a half  
3 already.

4 THE COURT: No. I was going to take him up  
01:50:29PM 5 separately, but we can turn to that now. What reasonable  
6 limit would you place on his testimony?

7 MS. FRYSZMAN: Ms. McOwen was going to -- do that.

8 THE COURT: What, what -- yeah.

9 MS. MCOWEN: Your Honor, the reasonable limit that  
01:50:49PM 10 we would propose is the nine and a half hours that have  
11 already been taken. Mr. Tayback, counsel for Daoud, conducted  
12 a very effective and efficient deposition over two days in Los  
13 Angeles where Daoud's counsel are based. He covered all the  
14 important subject matter of the lawsuit. And our position is  
01:51:10PM 15 that they've had a full and fair opportunity to depose  
16 Mr. Gurung.

17 Approximately 3 hours of that time was spent on  
18 translation. We believe that that is a fair length of time  
19 for Mr. Gurung. It would really work a hardship on him to  
01:51:29PM 20 have to be deposed again, particularly if it is across the  
21 country. He's a low wage worker at a gas station in New  
22 Jersey.

23 THE COURT: Yeah, why was he deposed? Was it just  
24 an accommodation to defendant's counsel? I mean, Los Angeles,  
01:51:44PM 25 I would have thought was a very unlikely place. I mean, the

1 case is pending here. He lives in New York.

2 MS. MCOWEN: Both plaintiffs and counsel for Daoud  
3 have lawyers located in Los Angeles, and so it was a  
4 compromise. Paul Hoffman, who is counsel for the plaintiffs,  
01:52:02PM 5 is located in LA, as well as the Quinn Emanuel, attorneys for  
6 Daoud & Partners.

7 THE COURT: Anything you want to say about that?

8 MR. SARLES: A couple of things, Your Honor. First,  
9 prior to the deposition, we weren't even told that Mr. Gurung  
01:52:21PM 10 was in New York. We believed he was coming from Nepal and so  
11 Los Angeles seemed like a logical location. I agreed to that.  
12 In terms of continuation, we are willing to travel to New York  
13 if that's necessary, but we don't think nine and a half hours  
14 is a reasonable limit. Your Honor suggested ten and Mrs. -- I  
01:52:39PM 15 think the person that everybody would agree is the most  
16 important --

17 THE COURT: Yeah, I agree. I think special rules  
18 probably apply to him. How long --

19 MR. SARLES: We've requested three additional hours,  
01:52:47PM 20 I believe. KBR has requested an additional seven, so I will  
21 let them speak to that.

22 THE COURT: Is that concurrent or consecutive?

23 MR. SARLES: Consecutive.

24 THE COURT: Ten more hours?

01:52:57PM 25 MR. SARLES: An additional ten. But, speaking for

1 Daoud, we have requested three on our own behalf. That would  
2 be -- the other items requested in our motion are, of course,  
3 the document production issues that we have raised.

4 One of them is the asylum documents, which I  
01:53:15PM 5 think we have set forth in our papers the reasons those should  
6 be produced before his deposition continues. And, also, the  
7 speech he gave at the U.N. There was testimony in his  
8 deposition that he handwrote a copy of that speech and we  
9 still don't have that, a copy -- and it's a speech purely  
01:53:33PM 10 about the facts of this case. And that is a document we  
11 believe we're entitled to before we depose him any further.

12 THE COURT: Do you want to speak further to that?

13 MS. MCOWEN: Yes. Your Honor, this is one of the  
14 reasons why we don't believe that further deposition of  
01:53:48PM 15 Mr. Gurung is necessary, that the subject that both KBR and  
16 Daoud would have identified as subjects for further deposition  
17 are not proper subjects of discovery. The issue that  
18 Mr. Sarles raised with respect to the U.N. documents, they  
19 framed as of the spoliation issue; but it is clearly not a  
01:54:14PM 20 spoliation question. Mr. Gurung produced the final uttered  
21 version of his speech, which he delivered before the United  
22 Nations in October 2009. There's a video of that speech which  
23 has been produced to the defendants. He's also now produced  
24 the final Nepali script that he read out loud that day. In  
01:54:39PM 25 the deposition, Mr. Gurung indicated that he had taken some

1 handwritten notes on the speech that were then typed up into  
2 the final version that he read out loud. There is plenty of  
3 authority, Your Honor, that when notes like that are then  
4 transcribed or typed into a final version, it is not  
01:55:02PM 5 spoliation if the original notes get lost, which, in this  
6 case, we simply don't have the original handwritten notes --

7 THE COURT: Well, that's a different issue. So you  
8 say they just don't exist. So it's not a whole lot of use  
9 arguing about what to do with them. They don't exist at all.

10 MS. MCOWEN: That's right, Your Honor.

11 THE COURT: Okay.

12 MS. MCOWEN: Except for the final version which has  
13 been provided.

14 THE COURT: What was the other topic you wanted to  
01:55:25PM 15 go into?

16 MS. MCOWEN: The asylum question, which we believe  
17 is simply beyond the bounds of discovery, it is an important  
18 public policy that this Circuit has recognized, that every  
19 circuit I know of has recognized. It is an issue that goes  
01:55:37PM 20 far beyond just Mr. Gurung. It has a potential of having a  
21 devastating, chilling effect and the last thing is with  
22 meritorious claims.

23 THE COURT: Mr. Sarles, just one second, please.  
24 Okay.

01:56:06PM 25 MR. SARLES: The first thing I would like to say is

1 those are not the only two topics that we have requested  
2 additional examination on. The deposition concluded sort of  
3 just at the beginning of discussing with Mr. Gurung his actual  
4 work and life at the al-Assad Base, so I based -- and that  
01:56:23PM 5 includes issues such as his time sheets which he signed and  
6 filled out on a daily basis. None of those were able -- able  
7 to be put before him in the time that we had.

8 THE COURT: What did y'all talk about so long?  
9 When -- what kept y'all busy?

01:56:36PM 10 MR. SARLES: We talked about his journey from Nepal  
11 to Iraq and his work there and his travel back and his current  
12 life in New York, which was, you know, a surprise to us. You  
13 know, we submitted the entire transcript to the Court. I  
14 think we just heard plaintiff counsel say that Mr. Tayback  
01:56:55PM 15 took an efficient examination. I don't think there's any  
16 dispute about that, but there was not time wasted. There's a  
17 lot of ground to cover with this witness.

18 And plaintiffs in their papers say there was  
19 time wasted on little details like access to restrooms and  
01:57:09PM 20 where food was eaten. But those are the kind of details that  
21 matter when Mr. Gurung is claiming he was held against his  
22 will and held in horrid conditions. The little things that he  
23 did every day mattered, the trip to Subway with KBR witnesses.  
24 Those are the kind of little things that matter --

25 THE COURT: Slow down, slow down.

1 MR. SARLES: I apologize.

2 In any event though, what are the additional  
3 issues related to his time at the al-Assad Base including  
4 medical care, including the other individuals that he arrived  
01:57:37PM 5 with? Some of them left before him. Some of them stayed long  
6 after him. And we haven't gotten to examine Mr. Gurung about  
7 those individuals and why he believes they were being held  
8 against their will.

9 Some left earlier, some left later, some signed  
01:57:54PM 10 additional extensions with Daoud. Those are important topics  
11 of examination. In addition on the asylum issue, none of the  
12 cases that plaintiffs cited deal with the situation where the  
13 facts underlying the asylum petition overlap with the facts of  
14 this case. They are asserting emotional distress damages to  
01:58:18PM 15 the present day; and in that proceeding, Mr. Gurung blamed  
16 third parties, a terrorist group in Nepal, for pressures  
17 against his life and safety in Nepal during the same time  
18 period that he is claiming that those harms are the cause --  
19 or were caused by our client. So he put it in issue in a way  
01:58:38PM 20 that none of the plaintiffs in the cases -- or that plaintiff  
21 cite have put it at issue. Moreover, we have got a protective  
22 order in this case. They are free to designate any of that  
23 information to keep it confidential. And it simply would not  
24 be fair to -- it is a classic sword and shield situation for  
01:58:56PM 25 Mr. Gurung to claim damages for issues that he had blamed

1 other parties for in another proceeding and then shield that  
2 discovery where he blames the other parties.

3 THE COURT: Okay. I will allow an additional  
4 seven hours of his deposition. The defendants can divide it  
01:59:17PM 5 up between themselves however they wish. It is seven total.  
6 I do not want any discussion of asylum. I do not want any  
7 discussion about notes that may have been spoliated. We will  
8 deal with both those issues later when we understand the case  
9 better.

01:59:37PM 10 I do think -- he is clearly the most important  
11 person in the case. And I think the rules need to be  
12 stretched to accommodate that fact.

13 It will be his choice and his counsels where  
14 to -- where to hold the deposition. And I will even -- if it  
02:00:02PM 15 will help them, I will even authorize the deposition to be  
16 held on a weekend or a holiday so he misses the minimum  
17 possible amount of time from his job.

18 Now in terms of -- well, okay. Let's turn next  
19 to plaintiffs' motion for a continuance under 56(d). I do  
02:00:42PM 20 think it is appropriate to give the plaintiff some additional  
21 time. But we haven't got a response from KBR about what they  
22 think would be a reasonable amount of time other than I  
23 suspect they oppose the continuance. How long do the  
24 plaintiffs think this will require?

02:01:13PM 25 MS. FRYSZMAN: I think, Your Honor, it depends on if



1 we can get a 502(d) stipulation ordered so that we could  
2 obtain the documents from KBR-Halliburton in electronic form  
3 and review them in our offices. And I think that would speed  
4 things along considerably and make this go quicker. Without  
02:01:44PM 5 that, I don't know how we are going get past the roadblock  
6 that we are on on discovery where --

7 THE COURT: KBR, you know, takes strong exception to  
8 the suggestion they have dragged their feet on this. They  
9 think they've made the searches asked of them and used the...  
02:02:01PM 10 in terms that were asked.

11 MS. FRYSZMAN: I guess I wanted to make super clear,  
12 because we don't actually have those documents. They have run  
13 the searches and told us the numbers of documents. So they  
14 have run the search and said there are 874 documents that  
02:02:13PM 15 combine the words trafficking, enslavement... We don't  
16 actually have that document and we have never seen it, and  
17 that's where we are stuck. They have run the searches, told  
18 us the numbers, but we've never seen the actual document at  
19 all. We have had no more documents from KBR than at the last  
02:02:30PM 20 hearing that we had when we were here and we started talking  
21 about electronic discovery. They haven't searched and  
22 produced the documents. They have just told us the numbers of  
23 documents that have been responsive to our searches --

24 THE COURT: And what's their response to your  
02:02:42PM 25 inquiry about when you can see them?

02:02:56PM 1 MS. FRYSZMAN: They said we could come to their  
2 offices, review the notes, secure terminals, not take any  
3 notes, be observed by an observer and that they may would  
4 consider producing them but there was no guarantee that we  
5 would get them. And there's no time period at which, you  
6 know, we would be definitively done. As at the terminals, we  
7 would have to review them one by one. And that's -- we're  
8 trying to think of a better way than that. It is really old  
9 school. Like, the modern way to do it, and the way it has  
10 been described in the Federal Rules of Evidence and the  
11 Federal Rules of Civil Procedure, is through a 502(d)  
12 stipulation. The 50 --

13 THE COURT: All right. All right. Let me hear from  
14 KBR.

02:03:25PM 15 MR. DONLEY: Your Honor, there have been some  
16 serious misrepresentations made to this Court in the documents  
17 that have been filed regarding this issue. What I brought  
18 with me today, Your Honor, and it is in the file, but it's  
19 worth me going through these again. May I approach, Your  
02:03:47PM 20 Honor?

21 THE COURT: If you have something to give to me,  
22 give it to Ms. Loewe if you would -- or will.

23 MR. DONLEY: Thank you. Your Honor, the plaintiffs'  
24 counsel in the motion for continuance, as well as the 56(d)  
02:04:03PM 25 declaration, has stated that KBR has not been running various

1 search terms -- that we haven't run search terms, such as  
2 Daoud. Nothing could be farther from the truth, Your Honor.

3 When I saw their documents and I saw it sworn  
4 to this Court that we had not run --

02:04:19PM 5 THE COURT: I will give you equal time. I will give  
6 you equal time.

7 MR. DONLEY: -- that we had not run these search  
8 terms, I was beside myself. What I have just handed the  
9 Court, Your Honor, it is in the documents that have been  
02:04:29PM 10 filed, is an October 21, 2010 letter from Mr. Matt Handley  
11 with Cohen Milstein to Mr. Mike Mengis.

12 THE COURT: Okay. Yes.

13 MR. DONLEY: If you turn over to the second page,  
14 Your Honor, that second page begins the search terms that were  
02:04:43PM 15 searched that are relevant to this letter from Mr. Handley.

16 Those search terms you will see at the top. The first search  
17 terms under KBR search terms is Daoud. Next is Daoud &  
18 Partners. And then the variations that were run, DNP, DP,  
19 D & P. All the way down, Your Honor, there's 30-40, 50,000  
02:05:06PM 20 hits. You will see the hits on the right-hand column. These  
21 search terms were run. They were provided to Cohen Milstein  
22 by October 21, 2010.

23 THE COURT: With the underlying documents?

24 MR. DONLEY: Not with the underlying documents.  
02:05:20PM 25 Here's where we were at the time, Your Honor. The parties had

1 agreed upon these search terms. These search terms had been  
2 run. We then provided -- and I thought I heard Ms. Fryszman  
3 just say we had not provided them with the number of hits  
4 either. This document shows we --

02:05:31PM 5 THE COURT: I think she said you did, you did  
6 provide that.

7 MR. DONLEY: All right. Thank you, Your Honor. So  
8 at this point -- with this document, we had run these search  
9 terms. We had gotten this number of hits in the right-hand  
02:05:44PM 10 column of this document; for instance, Daoud, the number of  
11 hits, 7,214 and then on down the list.

12 Cohen Milstein then took this entire list of  
13 search terms, which is five or six pages long, and as  
14 Mr. Handley's letter shows us, Cohen Milstein then highlighted  
02:06:08PM 15 those search terms which they wanted KBR to review the  
16 documentation and determine what was to be produced with  
17 regard to those search terms.

18 What's most relevant here, Your Honor, is that  
19 all the search terms for Daoud, Daoud & Partner, and  
02:06:24PM 20 plaintiffs' proposed variance of those, were not highlighted.  
21 The terms were run as of October of 2010, Your Honor. The  
22 results were provided to Cohen Milstein and they decided at  
23 that time they did not want us to review the documents, us  
24 being KBR.

02:06:42PM 25 What they filed with you, Your Honor, in the

1 motion for continuance, and they say it over and over and over  
2 again, KBR hasn't done all these things with regard to  
3 electronic discovery. We, indeed, have, Your Honor.

4 And then you will recall, Your Honor, earlier  
02:06:57PM 5 this year we came in on a motion for protection. That was  
6 filed by KBR. We said at that time, we said we think we have  
7 done enough. Your Honor told us to get with plaintiffs'  
8 counsel and work through search terms. Work on this a little  
9 bit more.

02:07:10PM 10 At one point, Mr. Lowes was here. Mr. Lowes  
11 said, I will talk to plaintiffs' counsel and see if I can  
12 help. Over the course of the summer, Your Honor, plaintiffs'  
13 counsel provided us with search terms. KBR ran those. We  
14 have provided those hits, the number of documents returned for  
02:07:28PM 15 any given search terms, back to plaintiffs' counsel.

16 Some additional searches that were run, Your  
17 Honor -- if I may, I have another document, please.

18 I'm going to continue on here, Your Honor, with  
19 the Daoud and Daoud-related search terms. The document I just  
02:07:54PM 20 handed you is -- most of it, it is already part of the record.  
21 I'll clean this one up a little bit so you can see the actual  
22 terms and hits. The top box shows us those search terms that  
23 were run on October 21 that we just discussed that Daoud  
24 said -- plaintiff said they did not want us to review and  
02:08:11PM 25 consider producing any documents.

1 The next set is March 23, 2010, that's why the  
2 date is there. We ran all of these Daoud-related search  
3 terms. Again, you can see the hits in the right-hand column.  
4 They go on for pages, Your Honor, with all the various and  
02:08:27PM 5 number of hits that are returned for Daoud.

6 When you get over to page 6, May 25th, we ran  
7 another set of search terms for plaintiffs with regard to  
8 Daoud and things related to Daoud. Ultimately, Your Honor,  
9 when you get to the back of this, all of these hits for Daoud  
02:08:45PM 10 that plaintiffs' counsel has sworn in a declaration, has  
11 stated in a motion for continuance KBR did not run, returned a  
12 total of 546,282 hits. It is the number on page 8 at the  
13 bottom.

14 Your Honor, they have come in here and told you  
02:09:02PM 15 a story about why they need a continuance. Most of that story  
16 is, well, KBR hasn't done what it should have done with regard  
17 to electronic discovery and search terms and we haven't run  
18 things. We did, Your Honor. And we have done it, and we have  
19 done it, and we have provided it over and over again to  
02:09:18PM 20 plaintiffs' counsel.

21 I have got two more documents, Your Honor, I  
22 would like to hand you on other search terms that the  
23 declaration and the motion said we haven't ran.

24 These search terms, Your Honor, that plaintiffs  
02:09:43PM 25 say we haven't run up to this point relate to human

1 trafficking, coercion, deception, passport confiscation and  
2 labor abuse.

3 Let's start with the one that is human  
4 trafficking, Your Honor. You can see on October 21 that we  
02:09:59PM 5 provided to Mr. Handley the letter we saw a few moments ago.

6 THE COURT: Slowly now.

7 MR. DONLEY: Thank you, Your Honor. We ran human  
8 trafficking in all kinds of ways and things related to human  
9 trafficking.

02:10:11PM 10 March 23, 2012, we did again. March 25, 2012,  
11 on page 3, plaintiffs' counsel had given us additional search  
12 terms. We ran those. If you turn to page 4, Your Honor,  
13 there is a total again. These hits on things related to human  
14 trafficking returned 538,445 hits, which means documents, not  
02:10:30PM 15 pages, Your Honor, documents. And as you might have recalled,  
16 KBR has stated before that we think our best guess is that  
17 each document is going to be roughly 7 pages.

18 THE COURT: 7 pages, yeah.

19 MR. DONLEY: The next document I have handed the  
02:10:46PM 20 Court for terms that the declaration and the motion for  
21 continuance says KBR hasn't run is for coercion, deception,  
22 passport confiscation and labor abuse.

23 October 21, we ran terms. March 23, again,  
24 after receiving them from plaintiffs' counsel, we ran terms.

02:11:03PM 25 Those go on for a number of pages, all the way

1 over to page 6 where we begin with May 25, 2012. We, again,  
2 ran terms related to those issues. And then on page 8, again,  
3 we have the total for all the hits we have run. We have  
4 provided all of these to plaintiffs' counsel. Most of these  
02:11:21PM 5 terms were terms they gave us, 756,687 hits or documents, Your  
6 Honor.

7 Now I'm not sure how to take it with  
8 plaintiffs' counsel coming into this Court providing a motion  
9 for continuance and declaration saying KBR has not done any  
02:11:36PM 10 searches of any of these terms when most of the terms I just  
11 went through came from plaintiffs' counsel and they certainly  
12 participated in preparing these. They have used these things,  
13 Your Honor, to try to convince you to give them an extension.

14 THE COURT: How about the underlying documents?

02:11:50PM 15 MR. DONLEY: The underlying documents, here's how we  
16 handle those, Your Honor. We ran all of these searches. We  
17 kept getting letters from plaintiffs' counsel. These are  
18 tests, these are test searches, these are test searches. We  
19 don't know where to go any longer. We finally said, here's  
02:12:02PM 20 what we will do. So far all of these test searches we have  
21 run for you returned 2.2 million pages, about 250,000  
22 documents, if you get through all of these.

23 We told them what we were willing to do was to  
24 put those on a platform available for their review at Baker  
02:12:23PM 25 Hostetler's Offices in Washington, D.C. so that then they



1 could review them, decide what they thought was relevant --  
2 most of these documents, Your Honor, are not going to be  
3 relevant; they can't be. 2.2 million pieces of paper I don't  
4 think are going to be relevant. They could decide what they  
02:12:36PM 5 think is relevant. We could then -- we'd review those with  
6 plaintiffs' counsel. If we agreed, they would be produced.  
7 If we had a dispute over what we thought was relevant, we  
8 would provide that to the Court in a motion and let the Court  
9 decide whether or not the documents should be produced.

02:12:49PM 10 We thought that was a very appropriate way to  
11 try to tackle this problem considering the vast number of  
12 search terms we were asked to review and the enormous number  
13 of hits that were being produced as a result of those search  
14 terms. Now one thing Your Honor had asked KBR to do was to  
02:13:11PM 15 help plaintiffs' counsel with trying to narrow search terms.  
16 Without plaintiffs' counsel being able to tell us they had any  
17 case, that was difficult for us to do, but we tried. We have  
18 sent a letter and expressed to them, here are things you might  
19 consider in trying to narrow your search terms so that you can  
02:13:30PM 20 come up with a more competent number of documents for review,  
21 something smaller. That didn't seem to phase plaintiffs'  
22 counsel.

23 As you will recall, Mr. Lowes was here for a  
24 hearing. He said he would talk to plaintiffs' counsel. We  
02:13:44PM 25 all got on the phone with plaintiffs' counsel. In fact, it

1 was myself, Mr. Mengis, Mr. Graves was there, Mr. Lowes, IT  
2 personnel from KBR were all on the phone at our end. On the  
3 phone at the other end, I believe, was Ms. Fryszman and they  
4 had a lawyer who was a specialist in electronic discovery on  
02:14:00PM 5 their side. We talked maybe 45 minutes, hour and a half, I  
6 don't recall. It was long enough to make sure we covered all  
7 the plaintiffs' counsel's issues, concerns and questions.

8 So we have done everything we now can and that  
9 we know to do from KBR's perspective to work with them.

02:14:18PM 10 Regardless, they still come into this Court and try to  
11 claim -- in fact, they don't try to claim, they did claim.  
12 They claimed that KBR has not done any of these things with  
13 regard to electronic discovery.

14 Your question though was, Judge, what then did  
02:14:31PM 15 KBR decide to do with all these documents. We told  
16 plaintiffs' counsel, we will just give them to you. We are  
17 glad to let you review them. One of the first questions that  
18 came back was, well, what we would like to have available to  
19 us is software that would allow us to do word searches and  
02:14:45PM 20 things through these documents.

21 I believe Mr. Mengis and I might have been on  
22 that call. I know I was on that call. And our response was,  
23 well, that sounds reasonable. We will see if we can come up  
24 with something so that you can accomplish that task. Do you  
02:14:58PM 25 have a software or something you would like for us to consider

1 to see if we can get that set and established on this portal?

2 We have never heard back, Your Honor, on that  
3 issue. Instead, what we ultimately were told from plaintiffs'  
4 counsel, it would be funny if it wasn't for the amount of

02:15:17PM 5 money KBR has spent in this case. Well, what we were told is,  
6 reviewing all these documents would be too expensive. Those  
7 two words are a quote. Ms. Fryszman told us to review all  
8 these documents would be too expensive. Despite that, she  
9 still would like to come to this Court and claim KBR has done

02:15:32PM 10 nothing and make KBR do a lot more yet, Your Honor. That  
11 seems unfair and it's certainly, right now, the information  
12 before this Court is on the record that it is inaccurate and  
13 it is misleading by plaintiffs.

14 Where it has been left, Your Honor, is here:

02:15:46PM 15 The last communication was from us to plaintiffs' counsel:  
16 What do you want to do with these documents? We haven't heard  
17 back from them. My understanding was is that they were going  
18 to get a plan back to us with regard to these electronic  
19 documents, and we have not received one to this day despite  
02:16:01PM 20 the fact that we have now filed a motion for summary judgment.

21 THE COURT: All right. Okay. Thank you very much.

22 Is it McGowen or McOwen? I'm sorry.

23 MS. MCOWEN: McOwen.

24 THE COURT: McOwen. I apologize.

02:16:17PM 25 MS. MCOWEN: No problem, Your Honor.

1 MS. FRYSZMAN: Your Honor, with regard to the  
2 Matthew Handley letter, we proposed certain terms from the  
3 initial run as an initial production that we asked KBR to  
4 produce within two weeks because they had said some of the  
02:16:31PM 5 terms generated too many hits. And I quote, Mr. Handley said:  
6 Although we agree that certain search terms --

7 THE COURT: Well, although we agree certain search  
8 terms --

9 MS. FRYSZMAN: -- that certain search terms will now  
02:16:43PM 10 need to be revised to reduce the number of hits, many of the  
11 search terms used -- and then he goes on to say, a group of  
12 them are now -- produced right away. We selected some that  
13 had low numbers of hits, like 100 hits or 3 or 64, and perhaps  
14 that wasn't the best way to proceed, but that's what we did.  
02:17:01PM 15 And then those were the hits that were produced. We weren't  
16 actually thinking at the time that those are probably the  
17 words that weren't used in very many documents and, therefore,  
18 were not very useful as search terms.

19 That's part of the reason for the low hits, but  
02:17:14PM 20 that was never intended to be the entirety of the document  
21 production because, for example, we didn't select the term  
22 Daoud; and if we had thought that that would be the end of the  
23 documents that we would ever get from KBR, we would have  
24 selected terms that included the other defendant in the case.

02:17:26PM 25 THE COURT: Well, he says he is waiting on you. He

1 says he's waiting on you.

2 MS. FRYSZMAN: On July 24th, and I have -- I can  
3 print this out -- I have on my Blackberry a copy of the  
4 message I sent to KBR attaching a proposed 502(d) stipulation  
02:17:39PM 5 to Mr. Mengis, and I have never heard back from them on this,  
6 my proposal to the 502(d) stipulation. I -- I mean, I could  
7 e-mail it to Ms. Loewe or you could print it out and look at  
8 it, but I --

9 THE COURT: How am I supposed to resolve these  
02:17:50PM 10 issues when the two sides disagree so radically about what the  
11 facts are? I just --

12 MR. MENGIS: Let me correct the record. I responded  
13 to Ms. Fryszman. It may have been orally, but I told her we  
14 were not going to do a 502(d) and we were going to go back to  
02:18:03PM 15 the proposal that we had made before. That is just simply not  
16 accurate.

17 THE COURT: I don't know what to do.

18 MS. FRYSZMAN: I think the bottom line is that I  
19 think Mr. Donley's presentation confirms what I have been  
02:18:15PM 20 saying, which is that they have given us the numbers of hits  
21 but we don't have the underlying documents. We have been  
22 trying all summer to come up with iterations of key words  
23 working on our own that would be targeted and effective  
24 working by ourselves, not with, you know --

02:18:29PM 25 THE COURT: Why did that take all summer? I've

1 never seen anything take all summer.

2 MS. FRYSZMAN: It's harder than it seems. It's  
3 difficult because -- because, for example, we did tests of  
4 things that were like near 20 or near 30 and then all we get  
02:18:43PM 5 is the numbers. We don't have the documents to compare to see  
6 what is effective and what's not. We get a response back  
7 that, you know, where we tested Sanjay and that made the  
8 numbers go way up, so we realized that Sanjay --

9 THE COURT: No, no, no, too fast.

10 MS. FRYSZMAN: Sorry.

11 THE COURT: Start that sentence over again.

12 MS. FRYSZMAN: We would test terms to see what  
13 terms, like the slang terms for third country nationals. Some  
14 of them it turned out were also names, so they drove the  
02:19:04PM 15 numbers up. So we would run it again without that to try to  
16 determine. But without seeing the documents, it is very hard  
17 to go through this process because essentially you are doing  
18 it completely in the dark.

19 THE COURT: And are you saying you are waiting on  
02:19:15PM 20 KBR while KBR says it is waiting on you? Is that where we  
21 are?

22 MS. FRYSZMAN: I guess we are at an impasse over  
23 whether the documents should be produced pursuant to a 502(d)  
24 stipulation of the federal rules of evidence provided or  
02:19:26PM 25 whether we will need to go there and review them one by one on

1 a secure terminal and not be permitted to take --

2 THE COURT REPORTER: Slow down, please.

3 MS. FRYSZMAN: I'm so sorry.

4 Or whether we will have to go to Baker

02:19:37PM 5 Hostetler's office and review the documents one by one on a  
6 screen without being able to take notes. Those seem to be the  
7 two choices on the table. But I think their iteration of the  
8 hits confirm that there are a lot of documents that are  
9 responsive to our requests. And, also, I think Mr. Donley

02:19:55PM 10 certainly confirms those documents haven't been produced. We  
11 have the number of hits, but not the underlying documents.

12 THE COURT: Does Daoud wish to be heard on this at  
13 all?

14 MR. SARLES: No, Your Honor.

02:20:16PM 15 THE COURT: I'm really -- I'm really at a loss to  
16 understand what to do when somebody -- factual predicates are  
17 the subject of such sharp debate. And it is -- it does have  
18 real world consequence right now because I can't otherwise  
19 decide what's fair in terms of the summary judgment deadline  
02:20:49PM 20 continuance. I know I haven't gotten anything in writing from  
21 KBR yet. Is there a period of time KBR could live with as a  
22 continuance?

23 MR. DONLEY: Your Honor, may I?

24 THE COURT: Yes, sir.

02:21:04PM 25 MR. DONLEY: Here is why KBR is struggling, Your

1 Honor. Now, on at least two, if not three, occasions,  
2 including the last time we were here, even the Court has asked  
3 plaintiffs, please tell us what is the link between the  
4 allegations --

5 THE COURT: Yeah, I agree with you.

6 MR. DONLEY: They have had nothing, your Honor. It  
7 goes a little bit further. This is the other reason why I am  
8 so bothered by their motion for a continuance. The first  
9 hearing that we attended this year on KBR's motion for

02:21:34PM 10 protection, when you asked, what is the connection,  
11 Ms. Fryszman said, I am going to have a strong case and she  
12 said this. She said it is not going to come from my client's  
13 documents; it is going to come from my plaintiffs and  
14 eyewitnesses who we believe.

02:21:49PM 15 If it is going to come from plaintiffs and  
16 eyewitnesses, why does KBR have to be put through all this  
17 burden? Why can't they tell the Court now, especially in a  
18 56(d) declaration, what is it they think they have, because I  
19 think that's what the rule requires, and what is it they think

02:22:06PM 20 these additional documents are going to prove? They don't say  
21 that in any of the papers that they have filed. Instead, all  
22 they did is sling mud at KBR claiming we have done nothing  
23 with regard to any of this electronic discovery trying to get  
24 the Court focused on, well, KBR must not be playing fair, when  
02:22:22PM 25 we have been trying to play fair all along. Your Honor, may I



1 grab one document real quick?

2 THE COURT: Yes, sir.

3 MR. DONLEY: Instead of going back to their motion  
4 for continuance --

5 THE COURT: Slowly, slowly.

6 MR. DONLEY: -- in the 56(d) declaration, while I  
7 was sitting there, Judge, I grabbed plaintiffs' discovery  
8 status report, which was filed yesterday. First paragraph,  
9 third to the last line -- fourth to the last line. For

02:22:49PM 10 example, although KBR's relationship with Daoud is key -- is a  
11 key issue in this case, none of the search terms have included  
12 Daoud or the names of any Daoud employees.

13 Judge, something else must be going on here. I  
14 have shown to the Court in the papers we have filed and again  
02:23:09PM 15 this afternoon that we did run Daoud. We have provided the  
16 results to that. The first go around --

17 THE COURT: I will give you time. I will give you  
18 time.

19 MR. DONLEY: The first go around, they could have  
02:23:19PM 20 highlighted those Daoud returns, those hits, and we would have  
21 reviewed those documents and produced those which were  
22 relevant. Well, now they are trying to use all of this to  
23 say, well, it is all KBR's fault, Your Honor, when it is not.  
24 We have done all we know to do and there's -- you can always  
02:23:33PM 25 do more. I understand. But we know all -- we've done all we

1 reasonably know to do to try to work through this process.  
2 That's where we ended up finally just saying, look, if you  
3 really want these documents we'll put them on a portal, reach  
4 a reasonable agreement with you, and let you review them that  
02:23:50PM 5 way. But none of these, from our perspective, is a reason to  
6 continue plaintiffs' response to the motion for summary  
7 judgment. They have told the Court, our evidence is coming  
8 from plaintiffs and eyewitnesses. Where are they, Judge? We  
9 are still looking for them. I can quote Ms. Fryszman. I've  
02:24:09PM 10 got the transcript over -- that's exactly what she has told  
11 this Court. She also told the Court -- you asked. You said  
12 KBR keeps saying you don't have anything to support your case,  
13 Ms. Fryszman, what does KBR do to protect itself? Her  
14 response was, file a motion for summary judgement.

02:24:26PM 15                   We have Your Honor. And we filed it not only  
16 based upon the written discovery responses we have gotten from  
17 plaintiffs today, but also the testimony of Buddi Gurung. He  
18 has now been deposed. It is not complete. But he's told us  
19 two significant things with regard to KBR. He was asked, what  
02:24:44PM 20 are your complaints about the conditions once you got to the  
21 base? With regard to KBR, he had two. He said, I told  
22 Donovan, a KBR worker, I want to go back to Nepal. What did  
23 Donovan tell you? He said Donovan told me, I'm just a  
24 warehouse worker like you, Buddi; you have to go speak with  
02:25:03PM 25 someone else.

1 Now in the papers they filed with the Court in  
2 the past, they said KBR told Mr. Gurung that you can't leave.  
3 That's not what Mr. Gurung testified to. He said KBR said,  
4 Bill or Donovan, because they both said the same thing, Buddi,  
02:25:20PM 5 we are just workers like you. You will have to go speak with  
6 someone else. That is a far cry from anyone at KBR telling  
7 Mr. Gurung, you can't leave this base. And, in fact, he has  
8 got no evidence that anyone ever told him, "You can't leave  
9 this base."

02:25:35PM 10 He was, also, asked about the trip getting into  
11 the base. He was asked, "Did anyone threaten you or coerce  
12 you?" He was asked about Mike. He was asked about Kaleek.  
13 He was asked about Pushka. These are the people who allegedly  
14 got him into Iraq. He said, no, no one ever threatened me.  
02:25:53PM 15 No one ever told me I was going to be harmed physically.

16 Where is the case here, Your Honor? Plaintiffs  
17 at some point have got to put up or shut up. They can't keep  
18 saying, KBR you have got to produce more, you've got to  
19 produce more, you have to produce more. They haven't even  
02:26:05PM 20 made a showing in the motion they filed or the 56(d)  
21 declaration that they have filed that they had anything,  
22 anything at all to support a case against KBR when they filed  
23 it. They are required to do that, Judge. When they have put  
24 their name on that pleading, they have got to have some  
02:26:23PM 25 evidence we have done something wrong, and they don't even

1 make that threshold showing in the motion for a continuance  
2 that they file. I say all this to say this, Your Honor.  
3 Because of those things, it is very difficult for KBR to come  
4 up and say, there's some period of time over which we are  
02:26:38PM 5 willing to allow plaintiffs a continuance to file a response  
6 to our motion for summary judgment. I understand, Your Honor,  
7 and I appreciate you would like for us to be able to come up  
8 with something on that, but I would also ask the Court to  
9 please appreciate the position we are in -- and we are looking  
02:26:53PM 10 at the totality of the circumstances. With what we know, we  
11 now have deposed the live plaintiff who made it into al-Assad.

12 THE COURT: I understand what your position is.

13 MR. DONLEY: And so that's why we are having a  
14 difficult time. If they needed a few weeks to respond to the  
02:27:09PM 15 motion for summary judgment, we can work through that, Judge.

16 I think in a document we have filed we have already offered  
17 10 days to respond to it. But we need a substantive response  
18 to the summary judgment. We need to know what these  
19 plaintiffs think they have against KBR because, so far, with  
02:27:22PM 20 everything they've filed with this Court all the way up to  
21 this moment, they haven't even made a threshold showing that  
22 they had anything to support their claims when they filed this  
23 case.

24 THE COURT: Okay. I understand. Ms. Fryszman.

02:27:41PM 25 MS. FRYSZMAN: Just to stay on the issue that is

1 before us, I just want to reiterate again when we said they  
2 hadn't searched for the documents that include the term Daoud,  
3 we meant with search and produce. We still don't have any of  
4 those documents that include that term.

02:27:55PM 5 THE COURT: Now, are they waiting on you for  
6 something?

7 MS. FRYSZMAN: No. We can give them a final litany.  
8 We are prepared to narrow down those searches we did over the  
9 summer and try to prepare a final list of terms that we think  
02:28:05PM 10 would work if we could get those pursuant to a 502(d)

11 stipulation. And I think that is the solution that is in the  
12 federal rules of evidence. The case law that we cited in our  
13 status conference report -- and others, have utilized that  
14 procedure. I think that's the way that courts are going now

02:28:26PM 15 with electronic discovery to protect the defendants with a  
16 502(d) stipulation to protect against waiver and to provide  
17 the documents in bulk to the plaintiffs. It would be easy to  
18 do. It is cheap. We have already run the searches. We would  
19 just move them over to a disk and produce it and they would be  
02:28:42PM 20 protected pursuant to a provision that Congress enacted  
21 specifically for this type of situation.

22 THE COURT: Have you made that very statement to  
23 KBR?

24 MS. FRYSZMAN: I sent them a proposed 502(d)  
02:28:55PM 25 stipulation, yes, on July 24th. They have rejected it, it

1 appears.

2 THE COURT: And is the sticking point the venue of  
3 production or the nature of whether you are allowed copies as  
4 opposed to review of a screen copy? What, what -- tell me  
02:29:09PM 5 what you think divides the parties.

6 MS. FRYSZMAN: Their proposal would require us to go  
7 to their office, look at the document on a screen, not be  
8 permitted to take any notes, not be permitted to take the  
9 document away with us and tag it for future review by KBR, and  
02:29:27PM 10 to do it one by one for all 2 million pages. I don't know how  
11 long that will take us, but it will not get us to summary  
12 judgment in 10 days. That's for sure. If we got the  
13 documents electronically on a -- pursuant to 502(d), we could  
14 then put them on our computer database, run keyword searches,  
02:29:48PM 15 review them, have them, take notes and be able to use them.

16 Under their --

17 THE COURT: What do you understand -- what do you  
18 understand defendant's response to be?

19 MS. FRYSZMAN: I think they just don't want to give  
02:29:58PM 20 them to us under 502(d). They just said no. They didn't  
21 really provide a reason. At one point, Mr. Lowe said he  
22 didn't want to do it because we were plaintiffs' lawyers and  
23 that was the end of the conversation.

24 THE COURT: Do you have -- do you have a  
02:30:12PM 25 confidentiality agreement in place?

1 MS. FRYSZMAN: Yes. You -- the Court entered it at  
2 the beginning of the case.

3 THE COURT: I thought so, yeah. And that's not  
4 enough comfort for anybody?

02:30:21PM 5 MS. FRYSZMAN: Just comfort for us.

6 THE COURT: Well, you are not producing some things,  
7 too. I mean, you are not producing provision asylum-related  
8 materials. You are not producing -- well, Ms. McOwen says it  
9 doesn't exist, but drafts of the speech in question --

02:30:39PM 10 MS. FRYSZMAN: It doesn't exist. Mr. Gurung took  
11 his notes to the -- to get typed up and then did not retain  
12 the notes. The speech also falls outside the end of the  
13 discovery period that we agreed on. I don't think he realized  
14 or thought he was under an obligation to retain those notes.  
02:30:54PM 15 And the final speech was, in fact, preserved and they have a  
16 copy of it.

17 THE COURT: Well, how about on the asylum issue?

18 MS. FRYSZMAN: I think that was addressed completely  
19 by Ms. McOwen, but I think the case law really is unanimous  
02:31:06PM 20 that the asylum documents are just strong public policy  
21 that -- reason to protect those. His asylum application isn't  
22 based on trafficking. And he testified fully as to the -- the  
23 acts of the Maoist. In fact, a lot of the transcript was  
24 taken up by Mr. Tayback's questioning of the emotional  
02:31:24PM 25 distress caused by the amount of violence and how it

1 continued.

2 So they have the basis for the emotional  
3 damages and enough material to challenge the emotional damages  
4 on those grounds. The only reason to get this application  
02:31:38PM 5 would further be to test his testimony. But courts have held  
6 that credibility isn't the reason -- I mean, we cited a number  
7 of those cases in our papers that credibility isn't a reason,  
8 but that it is always an issue. But that is not a reason to  
9 release the asylum application. And courts have also held  
02:31:52PM 10 that it is a chilling effect, not only on the plaintiff, but  
11 on their family members and other people that they may have  
12 lived with whose status may be in doubt.

13 THE COURT: But if there is a confidentiality order  
14 in place, wouldn't that take care of your concerns?

02:32:05PM 15 MS. FRYSZMAN: I suppose if we could redact it,  
16 maybe it would. There are other people whose interests are  
17 affected by the release of the asylum application, not just  
18 Mr. Gurung's. I could check -- we don't represent him in that  
19 action. I would like to have the opportunity to check with  
02:32:28PM 20 his asylum counsel, if I may.

21 THE COURT: Okay. So we'll -- in your mind, what  
22 remains to be done before you can respond to the summary  
23 judgment motion is some kind of agreement on 502(d) or  
24 something like it?

02:32:43PM 25 MS. FRYSZMAN: Yes, that's right, Your Honor. Some



1 ability to get at the documents.

2 THE COURT: Was July the last conversation you had  
3 about that then?

4 MS. FRYSZMAN: I don't recall with specificity when  
02:32:54PM 5 exactly the last conversation was.

6 THE COURT: KBR seems to think that was the last.  
7 They are nodding.

8 MS. FRYSZMAN: I don't remember and whatever I say,  
9 they will say I was wrong. I don't have a good memory for  
02:33:07PM 10 dates, but I just have to guess. I don't remember.

11 THE COURT: If it has been two months, why, why do  
12 we have that lag time?

13 MS. FRYSZMAN: For one, I was in Nepal for awhile  
14 interviewing the clients and getting the documents for most of  
02:33:16PM 15 September. I just got back on Tuesday. And so I was out.  
16 And...

17 THE COURT: You have important colleagues that could  
18 do some of this.

19 MS. FRYSZMAN: Matt was with me in Nepal. We were  
02:33:31PM 20 both there. I think -- I don't know. I can't explain why  
21 there has been this delay. There just has. I guess we were  
22 at an impasse. We got stuck. This plethora of motions got  
23 filed that we were a little bit under water in responding to  
24 all these motions and that's kind of where we still are.

02:33:45PM 25 THE COURT: Okay.

1 MR. DONLEY: Your Honor, may I very briefly?

2 THE COURT: Yes, yes.

3 MR. DONLEY: Your Honor, part of the problem with  
4 just a simple callback agreement, as I have shown just with a  
02:33:58PM 5 few search terms that I have placed in front of the Court  
6 today, the search terms are going to return documents well  
7 beyond and that have nothing to do with anything in this case.  
8 And so if there's just a simple callback, they would see all  
9 kinds of documents that have nothing to do with this case --  
10 not that they are just privileged, but just nothing to do with  
11 anything relevant to this case. And that's why we are trying  
12 to have a more reasonable approach to align, if you want --  
13 you want to ask for all these search terms, you want all these  
14 documents, we are glad to give them to you, but we have to  
02:34:28PM 15 have some other reasonable mechanism by which we can produce  
16 those. That's why we can't do -- you know, it would be  
17 inappropriate just to have some clawback arrangement.

18 MR. SARLES: May I say one thing?

19 THE COURT: Yes, sir.

02:34:40PM 20 MR. SARLES: There was a few comments about the  
21 asylum documents and the U.N. speech documents and I believe I  
22 heard Ms. Fryszman say that Mr. Gurung didn't preserve the  
23 draft of the speech that he wrote and then gave to plaintiffs'  
24 counsel who, quote, as Mr. Gurung testified, corrected it,  
02:34:58PM 25 that Mr. Gurung didn't preserve that draft because he didn't

1 believe he was under an obligation to preserve due to some  
2 agreement about the temporal scope discovery in this case.  
3 And I just want to make clear there is no agreement about the  
4 temporal scope of discovery. We have not made any agreement  
02:35:17PM 5 that plaintiffs are not obligated to preserve documents dated  
6 after any date, certainly not dated after they filed the  
7 lawsuit. The law is the exact opposite. They are under an  
8 obligation to preserve. And I just wanted to clarify that as  
9 far as we are concerned, they were under an obligation to  
02:35:34PM 10 preserve that document and all documents.

11 THE COURT: Okay. All right. The plaintiffs'  
12 response on the summary judgment would have been due  
13 September 19th. We granted a 10-day extension, and so the  
14 response is now due by October 1st. Right after we did that,  
02:35:59PM 15 plaintiffs filed another motion for continuance. I will give  
16 you -- I'll give you until October 22nd, which is a Monday.

17 Okay. I wanted to turn next to the plaintiffs'  
18 Motion to Compel production of KBR's Ethics Hotline Reports.

19 And that's your motion. Do you want to -- do  
02:36:32PM 20 you want to make the argument or are you willing to rest on  
21 the papers?

22 MS. FRYSZMAN: We can rest on the papers, Your  
23 Honor.

24 THE COURT: Does anybody from KBR want to speak to  
02:36:40PM 25 that?

1 MR. DONLEY: I do. Your Honor, if I may.

2 THE COURT: Yes, sir.

3 MR. DONLEY: Your Honor, our papers, we will rest on  
4 those as well, but I want to add one point. The Leamon case,

02:36:52PM

5 L-E-A-M-O-N, Judge Hittner's case, he has taken up -- Judge  
6 Hittner took up in that very case the very type and format of  
7 the Ethics Hotline Report that is at issue before you, Your  
8 Honor. In the Leamon case, Judge Hittner ruled that the very  
9 documents that plaintiff is seeking to obtain, documents one

02:37:15PM

10 and two, I believe they call them the Ethics Hotline Reports,  
11 as they come in from a caller, Judge Hittner has ruled those  
12 privileged. And that was not in our papers. I have now been  
13 able to talk to KBR's counsel on that case and confirm the  
14 very documents that are being requested here have already been  
15 ruled in the Southern District by at least one court to be  
16 privileged.

02:37:34PM

17 THE COURT: Well, and it may be, but the person on  
18 the receiving end was not necessarily a lawyer, was it?

19 MR. DONLEY: But they were working for the Legal  
02:37:47PM 20 Department, Your Honor, just as if it was a legal assistant, a  
21 paralegal or someone else connected to the Law Department.  
22 That's how it was set up. That individual, who took the call,  
23 reported directly to the Legal Department and the Legal  
24 Department has been the custodian for that information ever  
02:38:04PM 25 since.

1 THE COURT: Okay. All right. It says privileged.

2 MR. DONLEY: And as a result, we believe now -- Your  
3 Honor, as Judge Hittner did in the Leamon case, I have these  
4 documents available for you for in camera inspection.

02:38:14PM 5 THE COURT: I think I'd better, if we can, I think I  
6 better look at them.

7 MR. DONLEY: Okay. Your honor, may I provide these?

8 THE COURT: Yes.

9 MR. DONLEY: Thank you.

02:38:25PM 10 THE COURT: I would like to take a short break.

11 (Recess)

12 THE COURT: Now we have this huge issue of making  
13 plaintiffs available for depositions in Houston. I don't know  
14 what to do about expediting visas. I just -- I think that's  
02:55:24PM 15 beyond my control. I would think that, for depositions,

16 videoconferencing would be sufficient, but I am willing to be  
17 educated on any particular hardships associated with  
18 videoconferencing from Nepal. But that just postpones the  
19 main issue. I mean, if the case does survive summary judgment

02:55:51PM 20 and we do have a trial, I think defendants absolutely have the  
21 right to have plaintiff here in person. I don't know what to  
22 do about that. I really don't. If a letter from the Court as  
23 to our interest in having the case litigated fully would do  
24 any good, then I can do that. But if the Court is being asked  
02:56:13PM 25 to assure that the plaintiffs will return to Nepal afterwards,

1 I can't do that. I can't say anything at all about what their  
2 conduct will be once they come here. Is it your concern the  
3 government of Nepal is not fully behind this lawsuit? I mean,  
4 not behind it economically, but are they not supportive of the  
02:56:38PM 5 plaintiffs; is that the problem?

6 MS. FRYSZMAN: Oh, no. No. I don't have that  
7 concern at all. I'm sorry. I guess I don't understand the  
8 question exactly.

9 THE COURT: Well, I thought there was, in the  
02:56:50PM 10 papers, a suggestion that these visas are far from being  
11 assured, that they might not be granted at all.

12 MS. FRYSZMAN: It's the American government that  
13 would have to grant the visas, not the Nepal government.

14 THE COURT: Okay. Well, then, is the American  
02:57:07PM 15 government, is the American government less than enthusia -- I  
16 would think that -- all the more, so the American government  
17 would want to have -- want to have these allegations resolved.

18 MS. FRYSZMAN: I would hope so, and I think a letter  
19 from the Court would make a positive impact.

02:57:28PM 20 MS. MCOWEN: Your Honor, our understanding is that  
21 the Embassy is very supportive of the lawsuit. They routinely  
22 make their facilities available for litigants to conduct  
23 depositions at the Embassy in Kathmandu, which can also be  
24 done by video link. And so that is their preference, at least  
02:57:50PM 25 for the deposition stage, but they expressed that they were

1 perfectly willing to cooperate to the extent they can. Our  
2 understanding is that they have not denied the visas yet,  
3 pending our getting back to them with the defendants' position  
4 on hosting the depositions at the Embassy in Nepal.

02:58:15PM

5 THE COURT: And then that would be live or video  
6 conference?

7 MS. MCOWEN: It could be either, Your Honor. It  
8 would be more cost effective, perhaps, for the defendants to  
9 appear by video conference if they don't want to go to Nepal.

02:58:29PM

10 THE COURT: I'm not sure you really have the right  
11 to expect defendants to go to Nepal since the lawsuit was  
12 brought here.

13 MS. MCOWEN: With respect to the choice of forum,  
14 Your Honor, plaintiffs really didn't have a choice of forum.

02:58:45PM

15 Nepal was not an available forum. Jordan was not an available  
16 forum, and so they have come here to defendant --

17 THE COURT: No, I understand the problem, but -- but  
18 I don't -- I mean, maybe there's law I'm unaware of, but  
19 normally, the opposing party does have the right to have the  
20 plaintiffs presented in the district where the suit was filed.

02:59:05PM

21 MS. MCOWEN: It's been our experience in  
22 transnational cases that it is not unusual to conduct the  
23 depositions at least in another forum, whether its where the  
24 plaintiffs live or some in-between location. And it is also  
25 not unusual to conduct them by video link. The trial and the

02:59:27PM

1 need for live testimony at trial does tend to be, you know, an  
2 additional consideration that the Embassy will take into  
3 account and may lean toward granting them ultimately for trial  
4 if we make it to that stage.

02:59:45PM 5 THE COURT: Okay. Do you want to be heard on that?

6 MR. DONLEY: Please. Your Honor, it is terribly  
7 unsettling for the plaintiffs to sue KBR here in this district  
8 and then say, sorry, can't get there for deposition. But we  
9 have now heard the lawyers over and over again, but they'll --

03:00:01PM 10 we probably can get here for trial. That deposition is at  
11 least as critical as trial for a trial lawyer, Your Honor.  
12 I'm sure you are well aware of that. We are entitled --

13 THE COURT: I'm very concerned about this.

14 MR. DONLEY: Sure.

03:00:13PM 15 THE COURT: That's why I raised it.

16 MR. DONLEY: We are entitled to look those  
17 plaintiffs eye to eye and ask our questions. That's why the  
18 rules are as they are and that the rules require the  
19 depositions take place here in Houston. When you look at --

03:00:28PM 20 and we've asked for the documents on all the visa process. I  
21 don't believe they have been produced yet, because we have  
22 been told various stories that are inconsistent about why  
23 there are not visas for these plaintiffs to come here to the  
24 United States, the latest being is that apparently they can't

03:00:44PM 25 convince the U.S. Embassy that they have a reason to return to



1 Nepal, that they have family there, that they work there, that  
2 they have a home there, that they have possessions there.  
3 That just strikes me as utterly strange, Your Honor.

4 I think the plaintiffs either have to come here  
03:01:00PM 5 or the plaintiffs need to pay for KBR's counsel to travel to  
6 Nepal to take those depositions. That's not our choice. We don't  
7 want to go there to take them. I have no desire, frankly, to  
8 travel to Nepal. But we are entitled to sit across the table  
9 from them and ask our questions; and if we have to go to  
03:01:17PM 10 Nepal, because I think they won't get visas to come here, they  
11 need to pay our expenses. Video link, Your Honor,  
12 unfortunately, doesn't work very well. These plaintiffs have  
13 made some very serious allegations against KBR, including  
14 criminal conduct. It is a 60-plus page pleading that has been  
03:01:36PM 15 filed against KBR and we need to be able to sit and look at  
16 these people, look them in the eye, think about whether or not  
17 we think they are telling us the truth, determine what type of  
18 answer we just received. It has got to be done through an  
19 interpreter, so trying to do it by video link just doesn't  
20 work. We need to be able to sit across the table from these  
21 plaintiffs, take their depositions. We think we ought to be able to  
22 do it here in Houston. We don't think they have made  
23 reasonable efforts so far to get the visas, but if they are  
24 going to continue to say they can't get them, Your Honor, it's  
03:02:05PM 25 KBR's position they need to pay the expenses for KBR's counsel

1 to go to Nepal and take the depositions there.

2 MS. MCOWEN: Your Honor, may I respond?

3 THE COURT: Yes, you may.

4 MS. MCOWEN: The documentation of our -- the visa

03:02:24PM 5 application process has been produced to KBR. And I think  
6 that it -- I mean, strongly disagree with our characterization  
7 that we have not made reasonable efforts to obtain these  
8 visas. The United States State Department indicates that some  
9 60 percent of all visa applications by Nepalis are rejected

03:02:46PM 10 and it is not, Your Honor, because they can't prove that they  
11 have lived in Nepal. KBR appears to have a very naive view of  
12 how visas are obtained for very low income villagers from...  
13 Nepal. It is a difficult threshold to meet.

14 THE COURT: I don't deny that at all. I know that.

03:03:04PM 15 MS. MCOWEN: I can honestly tell you that all of the  
16 applicants are ready and willing to come here and yet the  
17 visas have not been granted yet. I strongly disagree with the  
18 characterization that we have not been diligent.

19 THE COURT: Do you think they are also ready to  
03:03:22PM 20 return when their business here is over?

21 MS. MCOWEN: I do, Your Honor. Unfortunately, they  
22 fall into a category of people that the Embassy is  
23 concerned --

24 THE COURT: Well, I know that.

03:03:32PM 25 MS. MCOWEN: -- that they see the United States as an

1 opportunity.

2 THE COURT: And the Nepalese consular officials can  
3 be of no help on that

4 MS. MCOWEN: In obtaining the visas?

03:03:45PM

5 THE COURT: Well, in communicating with the U.S.  
6 Embassy as to the likelihood of return or anything like that?

7 MS. MCOWEN: I'm not sure I understand the question.

8 THE COURT: I just -- I mean, I think it would be  
9 very hard for U.S. officials to determine things like family  
03:03:59PM 10 ties and plausible job opportunities and economic resources,  
11 the kinds of things the U.S. authorities would want to hear  
12 about whether someone would return to Nepal; and I would just  
13 wonder if there's not any government-to-government  
14 communication that could be had.

03:04:18PM

15 MS. MCOWEN: Well, Your Honor, this is what they do.  
16 They adjudicate visa applications constantly. So they view  
17 these visa applications as only a little bit different from  
18 any Nepali on the street applying. And the difference is that  
19 they come with a letter from counsel, from me, Your Honor,

03:04:38PM

20 saying that this is a legitimate lawsuit that is going forward  
21 in Houston and that it is in all the parties interests and  
22 desires to obtain visas. And I think that's the only reason  
23 why the visas haven't yet been denied, Your Honor, is that we  
24 have made this effort.

25 THE COURT: Uh-huh.

1 MR. MCOWEN: That said, we are trying to come up  
2 with a reasonable alternative that is not costly and not  
3 burdensome to anyone. I believe the fact that the case is  
4 proceeding here in Houston has been by in large very  
03:05:12PM 5 convenient for the KBR defendants. This is their hometown.  
6 This is really the one issue where there's a geographic issue  
7 that, you know, is going to make it very difficult for the  
8 plaintiffs to appear for this.

9 THE COURT: I know that. And I fully understand how  
03:05:29PM 10 expensive this case has gotten to be already. But, I mean,  
11 what do we have do about the defendants' right of  
12 confrontation and all? I mean, how do I --

13 MS. MCOWEN: I think there's plenty of case law  
14 supporting the use of video depositions. That was the case,  
03:05:49PM 15 Your Honor, with telephone depositions before we had the more  
16 sophisticated technology. And there are plenty of cases that  
17 proceed with telephone depositions. Now we have video, which  
18 does enable the questioner to effectively look the witness in  
19 the eye when asking the question.

03:06:08PM 20 I would also propose, Your Honor, and we have  
21 cited some case law to this effect, that if the case does  
22 survive summary judgment and if we are able to obtain visas  
23 for at least some of the witnesses to appear here in Houston  
24 at trial, that there could also be an opportunity for the  
03:06:31PM 25 defendants to confront the witnesses then prior to trial,

1 immediately before trial, which has been done particularly in  
2 cases where the questions focus on damages. And for a number  
3 of the plaintiffs, it appears that the bulk of the questioning  
4 would go to damages.

03:06:58PM 5 THE COURT: Okay.

6 MS. MCOWEN: Thank you, Your Honor.

7 MR. DONLEY: Your Honor, may I?

8 THE COURT: Yes, sir.

9 MR. DONLEY: Your Honor, the other thing -- the  
03:07:04PM 10 other thing that I forgot to mention is that there's about an  
11 11-hour time difference between Nepal and here. Somebody is  
12 going to be up very early in the morning and somebody is going  
13 to be up very late in the evening trying to do these by some  
14 type of video conference. Your Honor, it certainly wouldn't

03:07:23PM 15 be appropriate -- here's what I'm -- I keep struggling with  
16 and I'm not sure if everyone else is hearing this the way I  
17 am, but I'm hearing, we sure think we can get them here for  
18 trial. We don't think we can get them here for depositions.  
19 And if we can get them here for trial, we'll give KBR a few

03:07:40PM 20 days before trial a chance to depose these people. Your  
21 Honor, that obviously doesn't set well with KBR or its  
22 counsel.

23 We are on the record all over the place about  
24 what we think about this case and the lack of evidence. This  
03:07:52PM 25 case is, you know, with where we are now, we need these

1 depositions and we need to be able to look these people in the  
2 eye and get their answers. I heard Ms. McOwen say, it sure  
3 has been convenient -- notice the word she used -- it's sure  
4 been convenient for this case to be here in Houston filed  
03:08:07PM 5 against KBR. Not a 60-plus page complaint accusing KBR of  
6 criminal conduct. It's never convenient anywhere, Judge. And  
7 the amount of money that KBR has spent is just astronomical.

8 Well, let me read you what Ms. Fryszman said to  
9 the Court on March 13, 2012, when the Court asked, what do you  
03:08:27PM 10 have to connect KBR to this case, because it goes to why we  
11 need to be able to look these plaintiffs in the eyes.

12 Ms. Fryszman responded, I think the evidence from our  
13 plaintiffs will come largely from their testimony, not from  
14 documents. They are villagers in Indonesia. They don't have  
03:08:46PM 15 a lot of documents. And we will present a strong case. I  
16 believe with eyewitness testimony from both our plaintiffs and  
17 other witnesses, the people who we have contacted, who have  
18 contacted us who we believe.

19 She says her case. Plaintiffs' counsel says  
03:09:01PM 20 their case is going to come from these plaintiffs. These  
21 depositions from our perspective, Your Honor, are critical.  
22 Having to conduct them across some video link 11 hours or so  
23 between these parties -- or between the attorney and the  
24 witness being deposed through a translator, Your Honor, on  
03:09:18PM 25 this type of case with this type of statement with these types

1 of allegations made from KBR's perspective just isn't fair.  
2 Your Honor certainly has the ability to make this fair to  
3 either help find a way or to force plaintiffs' counsel to find  
4 a way to get these parties here for their depositions or to  
03:09:36PM 5 pay KBR's counsels way to go to Nepal and take the depositions  
6 there and take them live.

7 THE COURT: Well, I do think there's probably a lot  
8 of latitude. I am sensitive to the relative disadvantages of  
9 each potential approach. I think videoconferencing is always  
03:10:00PM 10 second best, and videoconferencing with an interpreter is a  
11 further complication.

12 I will take that under advisement.

13 We have got plaintiffs' Motion to Compel Three  
14 Limited Categories of Nonelectronic Documents. Do you want to  
03:10:32PM 15 speak to that, Ms. McOwen?

16 MS. MCOWEN: Actually, could I make one comment  
17 before --

18 THE COURT: Yeah, you may.

19 MS. MCOWEN: Just on the subject of diligence and  
03:10:46PM 20 plaintiffs' diligence over the past couple of months, Your  
21 Honor. I want to clarify the volume of discovery that we have  
22 been responding to, which includes no fewer than 5,561  
23 requests for admission served by KBR and over 1600  
24 interrogatories, all of which we are -- have been busy  
03:11:10PM 25 answering and verifying with our clients who include more than

1 20 individuals located in Baran, Nepal. The amount of time  
2 that that has taken, in addition to responding to some 500  
3 document requests and six pending discovery motions --

03:11:32PM 4 THE COURT: If that's excessive, why didn't you come  
5 to court to ask for some protection?

6 MS. MCOWEN: Your Honor, we are doing -- making our  
7 best effort to respond in full to the defendants' requests.  
8 We had been before you earlier this year about the interrog --  
9 the first set of interrogatories that the KBR defendants  
03:11:56PM 10 served. We are responding to those on Friday. So it is  
11 approximately 500 interrogatories.

12 In the interim, KBR served an additional set of  
13 approximately 500 interrogatories, which we answered and  
14 served yesterday. We are making every effort to respond in  
03:12:18PM 15 full and to work as diligently as we possibly can on every  
16 aspect of this case and it has simply left us in a position  
17 where we have not had as much time as we would have liked to  
18 be pursuing our affirmative efforts to receive discovery from  
19 Kellogg Brown & Root. And I just wanted to correct that, that  
03:12:44PM 20 point that was raised earlier.

21 THE COURT: Does anybody on your side want to speak  
22 to the issue of these three discrete areas of document  
23 discovery -- reports, records, disciplinary actions, documents  
24 related to investigations, documents from press and foreign  
03:13:14PM 25 affairs? You not -- you not willing to --



1 MS. FRYSZMAN: I think we are willing to rest on  
2 our --

3 THE COURT: Okay.

4 MS. FRYSZMAN: -- papers. We just filed the reply,  
03:13:25PM 5 I think, yesterday evening.

6 THE COURT: Okay. Yes, sir. You want to speak to  
7 that, Mr. Mengis?

8 MR. MENGIS: Yes, Your honor. Just a couple of  
9 quick points on this Motion to Compel with Three Discreet  
03:13:46PM 10 Categories of Documents. Number one, I won't spend long on  
11 this at all. I do believe there was a complete failure of  
12 plaintiffs' counsel to comply with the meet and confer rules  
13 and a misrepresentation to this Court, especially with regard  
14 to the Halliburton documents as to the nature of the

03:14:03PM 15 conversations between counsel. Ms. Fryszman asked me if I  
16 would -- if I represented Halliburton and if I would accept a  
17 subpoena on Halliburton's behalf or if there was any way I  
18 could facilitate the production of Halliburton documents. I  
19 have responded back to her quite simply, you are going to have  
03:14:24PM 20 to issue a subpoena. I have talked to the people at KBR --  
21 well, first of all, I don't represent Halliburton.

22 THE COURT: I know.

23 MR. MENGIS: And then, for the first time in the  
24 motion, she raises the issue of whether we have an obligation  
03:14:36PM 25 or not. That was news to me that such an agreement existed

1 and that we would --

2 THE COURT: Let me slow you down again.

3 We've got --

4 MR. MENGIS: I'm sorry, Your Honor.

03:14:42PM 5 THE COURT: -- this young woman has got to keep up  
6 with every syllable, okay? Start the sentence again.

7 MR. MENGIS: Since she had -- I did not know that  
8 there was such an agreement between Halliburton and KBR that  
9 would have made the docu -- that would have given Halliburton  
03:14:57PM 10 any type of an obligation to respond to our request. Since  
11 she raised that issue, we have requested Halliburton to search  
12 their files and to make available to us for review the  
13 documents she now seeks. As far as I am concerned, those  
14 two -- two of the three categories now have been mooted, and  
03:15:17PM 15 it could have been mooted before she filed her motion if she  
16 had simply raised that issue with me prior to filing. She did  
17 not. We have not heard back from Halliburton yet. When we  
18 do, I will report to her as to whether they have found any  
19 documents or not. We have produced all the documents subject  
03:15:35PM 20 to those two classes that we have found in KBR's possession.  
21 So there's nothing for the Court to consider as far as I am  
22 concerned regarding those two categories.

23 The more difficult issue is the one about the  
24 employee records where she asked us to review every single  
03:15:54PM 25 employee disciplinary file record to determine if anyone has

1 ever been disciplined or potentially disciplined for raising a  
2 complaint about the treatment of third country nationals,  
3 taking of passports and those types of issues. As we have set  
4 forth in our papers, Your Honor, KBR employed over 75,000  
03:16:15PM 5 individuals. The average employment record is 100 to 200  
6 pages. Our conservative estimate, it would take us about  
7 nine years for one person to review those 75,000 records in  
8 detail enough for us to know whether anybody was disciplined  
9 or potentially disciplined because of those types of  
03:16:35PM 10 allegations. The burden associated with that far outweighs  
11 the benefit of anything we might find. What we have done --  
12 and the reason Ms. Fryszman knows about the two instances that  
13 she cites in her motion is because they were referenced in  
14 e-mails that come from the nine POI's that she is complaining  
03:16:58PM 15 about that we got to handpick and they are not the people that  
16 should have been chosen. The very people that she knows about  
17 come from that electronic discovery. We believe, that if  
18 there were any others, they would have been shown in that very  
19 same electronic discovery.

03:17:16PM 20 The employment records are not fully  
21 electronically searchable. In fact an electronic search would  
22 be highly unreliable because a lot of the employment records,  
23 as you might understand, are handwritten. Those aren't  
24 searchable in an electronic format as reliably as typewritten  
03:17:34PM 25 employment records. And also, to determine whether or not

03:17:52PM 1 something is responsive, we believe would require an even more  
2 in-depth review of those documents. Given the fact that she  
3 has now dismissed her RICO actions against KBR, the relevancy  
4 of these documents is also very limited. So given the fact  
5 that we think she's already found the two -- and actually,  
6 there's only one that exists -- and the work that would be  
7 required in searching the remaining documents and the burden  
8 that that would entail just far outweigh any relevancy that  
9 the remaining documents may have.

03:18:11PM 10 Your Honor, one other point I would like to  
11 raise, because Your Honor noted at one point why we hadn't  
12 found it, in one of our prior hearings, Ms. Fryszman came up  
13 with a disciplinary record of Mr. Land. And in response to  
14 your question, I didn't know why we hadn't found it. We since  
03:18:33PM 15 went to go check Mr. Land's personnel file. The document is  
16 not there. So even if we had searched Mr. Land's record, we  
17 would not have found that document. I don't even know whether  
18 the one she has is authentic or not. I'm not saying it is  
19 not. I just -- we don't have a copy of it.

03:18:47PM 20 THE COURT: Okay. Thank you.

21 MS. FRYSZMAN: Your Honor, you asked earlier why  
22 things take so long. I guess one reason is that we had  
23 started asking about these documents in June and we wrote to  
24 the defendants and we got no response. We wrote again two  
03:19:10PM 25 weeks later; we got no response. I think the chronology is

1 here on pages -- the early pages of our -- of our filing where  
2 we detail the number of times that we wrote them and the  
3 number of times that we called them and we were completely  
4 ignored. We got no response whatsoever. And we detailed  
03:19:28PM 5 it -- not even the full thing, but it is in our papers the  
6 number of letters that we sent and the number of calls that we  
7 made and got absolutely no response over almost a six-week  
8 period. It wasn't until we called and said, we are going to  
9 file a motion, that we finally got them to respond to us.

03:19:41PM 10 When they sent their response, Mr. Mengis'  
11 letter said the documents are in the custody and control of  
12 Halliburton and that they wouldn't be produced. We accepted  
13 that, except that Ms. McOwen found on the Internet the  
14 separation agreement between Halliburton and KBR. I think it  
03:20:03PM 15 is not our job to know about that. It is their job to know  
16 about that. And they should have known about it. Those  
17 documents are plainly under their custody and control, and we  
18 would like a clear evaluation of whether -- all of our  
19 documents -- it appears that many more categories of documents  
03:20:18PM 20 may be housed at Halliburton. And it is additionally  
21 frustrating, because months ago we served interrogatories  
22 asking about the custodians, because I don't know if you  
23 recall, there was a question about the e-mail suffixes and I  
24 had a question about what the e-mail suffixes meant and they  
03:20:33PM 25 said it was because employees are second. And then we served

1 interrogatories about the --

2 THE COURT: No, too fast.

3 MS. FRYSZMAN: -- about the custodians and where

4 they worked. And our responses didn't reveal that the

03:20:42PM 5 custodians worked at Halliburton. I don't really have a good

6 idea of what has been searched, what hasn't been searched,

7 what categories of documents have been looked for, what

8 personnel files --

9 THE COURT: Well, have you had that conversation

03:20:57PM 10 with the other side?

11 MS. FRYSZMAN: We have tried. And on the issue of

12 additional acts, the Supreme Court has repeatedly held that

13 additional acts of either subsequent or prior go to knowledge

14 and go to intent. And we cited those cases, I think, on page

03:21:14PM 15 4 of -- I think maybe it was our Hotline Brief. But it is

16 Keyes versus School District, 413 U.S. 189 where the Supreme

17 Court held that evidence of similar and related acts tend to

18 show consistent pattern of --

19 THE COURT: No, we're going too fast.

03:21:36PM 20 MS. FRYSZMAN: -- consistent pattern of conduct

21 highly irrelevant to the issue of intent. We cited a couple

22 other Supreme Court cases, a Fifth Circuit case and a Fourth

23 Circuit case, United States versus Hattaway, 681 F.2d 214.

24 THE COURT: Repeat the cite, please.

03:21:52PM 25 MS. FRYSZMAN: 681 F.2d 214, Fourth Circuit, 1982.

1 And what the Fourth Circuit found that the -- that the  
2 subsequent acts were relevant in that they made it  
3 significantly more probable that the defendant in that case  
4 knowingly -- knowing committing the acts and was not merely an  
03:22:14PM 5 unwitting goal of the association.

6 It is clear that subsequent conduct and prior  
7 conduct and related acts are very relevant to the question of  
8 intent and knowledge, which is one of the key issues that  
9 remain in the case. That is why we believe that these  
03:22:26PM 10 documents are still relevant. And, um...

11 THE COURT: Well, the -- so I mean on the issue of  
12 the documents that are in Halliburton's possession, are you  
13 saying you just don't agree with defendants if they are in  
14 Halliburton's possession or you're saying you are asking about  
03:22:57PM 15 different documents or what, what...

16 MS. FRYSZMAN: What I am trying to say, hopefully,  
17 clearly, is we believe that that Master Separation Agreement  
18 provides that the documents that were left at Halliburton at  
19 the split in 2007 are still under the custody and control of  
03:23:12PM 20 KBR. So, for example, we got a set of the Hotline Reports.  
21 But they start in 2006. So I think if there are documents,  
22 other documents other than the ones that we have just  
23 discussed -- we have just stumbled on -- if there are other  
24 documents that we have requested that state that Halliburton  
03:23:31PM 25 left the Press Office documents or the Government documents,

1 that all of those documents are, in fact, under the Master  
2 Separation Agreement in the custody and control of KBR and  
3 should be produced even if --

4 THE COURT: Okay.

03:23:44PM 5 MS. FRYSZMAN: -- they are among the few that we have  
6 identified.

7 THE COURT: The production of personnel records or  
8 disciplinary records, that does sound like an awful lot for --  
9 for dubious relevance. Can you narrow that request at all?

03:24:01PM 10 MS. FRYSZMAN: It can be narrowed significantly. I  
11 think the numbers they provided was for every person that went  
12 to Iraq and that isn't what we are seeking. We could  
13 certainly narrow it by time periods. We can narrow it  
14 by location --

03:24:11PM 15 THE COURT: Why hasn't that been done? I mean,  
16 let's do that.

17 MS. FRYSZMAN: I would be happy to talk with them if  
18 they are willing to talk to us cooperatively to the end result  
19 of actually getting to an answer as opposed to just saying no  
20 and having -- just saying no. But I would be happy to work  
21 with them on getting to a narrower category.

22 THE COURT: Mr. Mengis.

23 MR. MENGIS: Your Honor, I raised this issue when  
24 she first filed her motion. I sent an e-mail to Ms. Loewe  
03:24:37PM 25 saying that they had not met and conferred and asking them to



1 withdraw their motion until we could confer. She refused.  
2 She went forward with her motion. These are exactly the types  
3 of issues that we should have talked about before we came down  
4 here, Your Honor.

03:24:52PM 5 MS. FRYSZMAN: We have been writing them for  
6 six weeks and then we were facing the discovery cutoff and we  
7 had not gotten a response until we threatened to move to  
8 compel. And we were worried that under the cutoff we would be  
9 cutoff if we didn't go forward. I don't think they dispute  
03:25:11PM 10 that they ignored all of our letters and phone calls.

11 MR. MENGIS: I do most certainly dispute. I told  
12 her we were working on a response. It was not the threat of a  
13 Motion to Compel. She wrote a six- or seven-page letter that  
14 took some time to respond to and to get the factual statements  
03:25:25PM 15 in my correspondence correct while working on other things.

16 Of the ten categories of documents that we responded to, she  
17 only came down here on three. So, obviously, we made some  
18 points in the letter. We were -- we stood ready to work on  
19 the remaining three and she didn't come back to talk to me  
03:25:45PM 20 about it.

21 THE COURT: Alright.

22 Well, before I rule on it, I would like to see  
23 the disciplinary records that are being requested and narrowed  
24 significantly.

03:26:03PM 25 The documents related to investigations

1 conducted by KBR as to human trafficking, that strikes me as a  
2 difficult search. Are there documents that can be accessed  
3 that deal with internal investigations?

03:26:37PM 4 MR. MENGIS: Your Honor, as far as the KBR documents  
5 are concerned, we have searched the KBR records as requested  
6 by Ms. Fryszman in the various places that she asked us to  
7 look, in The Press Office and the Government Affairs Office  
8 and so forth, to try and find those types of documents, as  
9 well as searching our files for investigations. We've done  
03:26:55PM 10 that. We've produced what KBR has found. It is either  
11 produced or it is in a privileged log. My understanding of  
12 her request here today was for the Halliburton documents. We  
13 have made a request of Halliburton to do that same search. I  
14 have no idea whether they will or won't. We have made the  
03:27:11PM 15 request. If Ms. Fryszman doesn't like that response, she can  
16 subpoena Halliburton.

17 THE COURT: I'm not going to grant the Motion to  
18 Compel. I do think we can make some more progress  
19 consensually before I need to rule on that.

03:27:29PM 20 I haven't set a discovery cutoff. I don't know  
21 if there's any point in doing so when I have authorized so  
22 many depositions. I'm inclined to let the parties make their  
23 own way on discovery; and if one party believes it has become  
24 excessive or unnecessarily consumptive of time, you can come  
03:27:54PM 25 back to me and ask me to set a deadline, which I will do.

1 Well, the two really hard ones are KBR's motion  
2 as to compel the depositions in Houston and plaintiffs' cross  
3 motion for protective order on video link.

4 Should we end the hearing before you die?

03:28:36PM 5 MS. MCOWEN: I apologize, Your Honor.

6 THE COURT: That's okay. I'm kidding.

7 MR. SARLES: Your Honor, could I just tell you one  
8 thing about the Houston depo issue. We are not taking a  
9 position on the location; but whatever the resolution, Daoud

03:28:50PM 10 does want the right to sit at the table and confront the  
11 witnesses in person without taking a position on where that  
12 location will be.

13 THE COURT: Has anybody suggested you don't have  
14 that right?

03:28:59PM 15 MR. SARLES: No, I just wanted to clarify.

16 THE COURT: All right.

17 Well, I'm going to go take another hard look at  
18 the cases on those two motions, and I will have something out  
19 in writing. Does anybody -- is there anything else we can do  
03:29:15PM 20 today?

21 Okay. Thank you all very much.

22 (Concluded)

23 \* \* \*

24

25

1 I certify that the foregoing is a correct transcript from the  
2 record of proceedings in the above-entitled cause, to the best  
3 of my ability.

4 //s \_\_\_\_\_ 10/10/2012  
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